No. 99-1625

In The

Supreme Court of the United States

TANGIPAHOA PARISH BOARD OF EDUCATION; E.F. BAILEY; ROBERT CAVES; MAXINE DIXON; LEROY HART; RUTH WATSON; DONNIE WILLIAMS, SR.; ART ZIESKE, in their capacities as members of the School Board; TED CASON, in his capacity as Superintendent of Schools,

Petitioners,

v.

HERB FREILER; SAM SMITH, individually and in his capacity as administrator of the estate of his minor child, Steven Smith; JOHN JONES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a school board has unlawfully advanced and endorsed religion by singling out the scientific theory of evolution as the sole topic in the curriculum subject to a mandatory disclaimer, when that disclaimer encourages students to adhere to the Biblical version of creation, was adopted immediately after the defeat of a proposed "Creation Science" curriculum, and was introduced specifically because its proponent believed that most students believe in the Biblical version of creation rather than in the scientific evidence.

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STATEMENT OF THE CASE

This case represents the latest in the continuing series of attempts to impose upon schoolchildren a religiously-based and doctrinal interpretation of life's origins and thereby to undermine both established science curricula and the benefits of a secular public education. Prohibited by the Constitution and Louisiana law from banning the teaching of evolution and from requiring the teaching of religious "alternatives," the Tangipahoa Parish Board of Education ("School Board") has sought to do through the back door what it cannot do through the front: instruct students not to believe their science teachers and the state-mandated science curriculum, but to adhere to religious interpretations of life's origins instead. This case, plain and simple, is about whether a school board may use its science classrooms to encourage its students to believe in religion over science. To pose the question is to answer it: a long line of decisions, of this Court and of lower ones, make it clear that a school board may do no such thing.

By disclaiming only evolution – the one element of the school curriculum that generates religious controversy – the School Board has violated both the constitutional mandate of neutrality toward religion and its obligation to provide its students with secular educations free from religious indoctrination or partisanship. The Fifth Circuit twice correctly recognized the impropriety of the School Board's thinly disguised efforts to impose a religious view on its students, and twice declared the disclaimer statement unconstitutional. *Freiler, et al. v. Tangipahoa Parish Board of Education, et al.*, 185 F.3d 337 (5th Cir. 1999) ("*Freiler I*"); *Freiler, et al. v. Tangipahoa Parish*

Board of Education, et al., 201 F.3d 602 (5th Cir. 2000) ("*Freiler II*"). Because those rulings were correct, this Court should deny the request for certiorari.

The Opinion on which the Petition is based is expressly limited to the factual context of this Disclaimer (Appendix A to Petition, p. 2a). The Petition misstates those facts in several material respects, notably by mischaracterizing the Disclaimer's stated purpose and its pertinent history. The District Court issued extensive findings of fact, all based on a stipulated record. Those facts were repeated by the Fifth Circuit in *Freiler I* and have not been challenged. (Appendix B to Petition, pp. 18a-20a and fn. 4 at 30a). Because the Opinion subject to review is explicitly fact-based, a correct accounting of the facts is critical.

A. The Disclaimer's Context:

1. "Creation Science": The Background

The Disclaimer did not arise in a vacuum. Over a period of weeks shortly before the Disclaimer was introduced, members of the School Board (including the Disclaimer's proponent) engaged in an unsuccessful attempt to have "religious materials" – including a full-blown "Creation Science" curriculum – introduced into the schools. The matter of "religious materials" was initially taken up by the curriculum committee where it was defeated. (Appendix C to Petition, pp. 39a-40a.) Despite its defeat in committee the proposal, including the "Creation Science" curriculum, was brought before the full School Board for consideration. By a 5-4 vote, the School Board voted not to adopt the "religious materials" policy.

(Appendix C to Petition, p. 40a). It was a few weeks after this defeat that the Disclaimer was proposed and adopted. (*Id.*)

2. The Adoption of the Disclaimer

The Disclaimer was introduced to the entire School Board rather than to the curriculum committee, where it belonged, because the committee had failed to approve the "Creation Science" curriculum. (Appendix C to Petition, p. 41a).[1] At the meeting at which the Disclaimer was proposed and adopted, Bailey (its proponent) made it clear that he wanted the Disclaimer precisely because he believed his constituents "do not share the belief in evolution, that they believe the Biblical version of creation, and that they 'resent their children being confused with the presentation of the theory of evolution.' " (Appendix C to Petition, pp. 46a-47a).

In debating the Disclaimer, the School Board rejected a motion to delete the reference to the "Biblical version of creation." The motion failed because, in Bailey's words, "I couldn't accept that and I think you deserve to hear why.

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[1] The School Board seeks praise for the fact that it never sought to eliminate evolution from the curriculum. Because this Court has ruled that school boards may not alter their curricula to eliminate evolution, *Edwards v. Aguillard*, 482 U.S. 578, 107 S.Ct. 2573 (1987), and because Louisiana public schools are required to teach evolution (Appendix C to Petition, p. 58a), the School Board has no choice in this matter. It was trying to tamper with the curriculum in the only way it could: to add a religious "alternative" to evolution and to discourage students from believing in the required science curriculum. The School Board is not entitled to kudos for following the law.

I think that by that, you've gutted the basic message of this document." (Appendix C to Petition, p. 43a). In other words, the "basic message" of the Disclaimer – as stated by Bailey and endorsed by the School Board – was the reference to the Bible. Bailey emphasized (without empirical support) that he believes that "perhaps 95 percent" of the students believe in divine creation, and that he wanted the Disclaimer to ensure that students wouldn't be confused by perceived discrepancies between what they learn in school and what they learn in Sunday School. (Appendix C to Petition, pp. 43a-45a).

Although the text of the Disclaimer purports to encourage students to explore "alternatives" to evolution, the District Court correctly observed that in the debate leading up to its adoption no School Board member listed any non-religious theory as "alternatives."(Appendix C to Petition, p. 46a).[2] All of the "other concepts" which School Board members discussed were religious, including the Biblical, as well as Hindu, Islamic, or American Indian versions (*Id.*). Discussions centered on the premise that children should not be taught evolution as "fact" because it conflicts with what they learn in Sunday School. (Appendix C to Petition, p. 47a). There were no expressed concerns about perceived conflicting secular explanations for the origins of life.

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[2] Both the record and common sense indicate that there are no such non-religious "alternatives." Respondents offered a report of an expert witness precisely to that effect. That report was unrefuted by the School Board.

B. The Disclaimer Was Adopted to Defeat Diversity, Not to Promote It

The School Board posits that the Disclaimer was intended to address a diversity of beliefs in the school system, yet the facts show just the opposite. As the District Court recognized, "during the discussion of the proposed resolution, no Board member stated that the reason the disclaimer was being introduced was to urge students to exercise their critical thinking skills or to examine all alternatives when forming opinions, purposes later embraced by Board members in depositions or in trial testimony." (Appendix C to Petition, p. 47a). In fact, the Disclaimer was adopted to bring the curriculum in line with the religious beliefs of what Bailey stated to be 95% of the students. The discussion focused on concerns for Christian students who, for religious reasons, may not want to learn the theory of evolution. *Id.*

Nor was the reference to the Bible intended as "illustrative," as the School Board now would have it. (Petition, p. 8). As the *Freiler I* decision explains, the reference to the Bible was not illustration but the basic message. (Appendix B to Petition, fn. 4, p. 30a). This is not, as the School Board now contends, an attempt to promote diversity or pluralism in the schools.[3] It is an attempt by

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[3] The dissent in *Freiler II* misinterpreted the facts in stating that the purpose of the Disclaimer was to "advance tolerance and respect for diverse viewpoints." (Appendix A to Petition, pp. 12a-13a). As the District Court found and *Freiler I* affirmed, the record contains no evidence that tolerance and respect for diversity were part of the discussions. The evidence is to the contrary: The Disclaimer was proposed precisely to advance

adherents to a particular religious doctrine to impose that doctrine on the teaching of science.

Moreover, evolution is the only topic in the curriculum that the School Board disclaims. (Appendix C to Petition, pp. 41a-48a). As this Court has found, objections to evolution are religiously based, and evolution is the one topic in a school curriculum that is religiously controversial. *Edwards v. Aguillard*, 482 U.S. 578, 593, 107 S.Ct. 2573, 2582 (1987). If the School Board really wants to encourage diversity of beliefs among its students, it would disclaim all manner of information, and would encourage students at all times and in all contexts to "exercise critical thinking and gather all information possible and closely examine each alternative toward forming an opinion." Singling out the religiously charged topic of evolution for such treatment shows that the School Board intends critical thinking to apply only to that subject. Under these facts, the Disclaimer clearly advances and endorses religion.

C. There Were No "Hurt Feelings" To Assuage

The School Board's post-hoc rationalization of the Disclaimer portrays it as an attempt to assure students that they may maintain their own opinions. However, the facts show that the Disclaimer was proposed not because of any expressed concern by students, but to impose the

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what its proponent insisted was the religious view of 90% or 95% of the students. Attempts to incorporate references to minority religious beliefs, such as Hindu, Muslim, American Indian, or others were explicitly rebuffed. (Appendix C to Petition, pp. 42a-43a).

religious beliefs of School Board members. The Disclaimer did not arise out of a student complaint, and there is no evidence that "hurt feelings" ever existed among students on this issue. In fact the reverse is true. Before the Disclaimer was adopted, students had the right to – and did – discuss "alternative" concepts with their teachers on an individual basis. (Appendix C to Petition, p. 47a). There were no student "outsiders" before the Disclaimer, as the School Board now claims (Petition, p. 21). To the contrary, everyone was included: teachers responded to student concerns individually as they arose, and all had the opportunity to discuss whatever concepts they wanted with their teachers. Only with the passage of the Disclaimer was there the chance of students becoming outsiders, because the Disclaimer mandates a specific reference to the "Biblical version of Creation," consistent with the religion of School Board members but not with that of all of the students.

REASONS FOR DENYING THE WRIT

This case does not meet any of the criteria of this Court for granting certiorari. It is not an exceptional case; the decision is in accord with established law; and there is no conflict among the circuits.

1. This Is Not an Exceptional Case

The Fifth Circuit, in both its panel decision and in denying rehearing en banc, limited its opinion to the specific facts of this case. In *Freiler I* the court stated "[w]e limit our analysis to the precise language of the

disclaimer and the context in which it was adopted. We do not confront the broader issue of whether the reading of any disclaimer before the teaching of evolution would amount to an unconstitutional establishment of religion." *Freiler I*, (Appendix B to Petition, p. 20a). Affirming, the court in *Freiler II* said "[W]e decide only that *under the facts and circumstances of this case*, the statement of the Tangipahoa Parish School Board is not sufficiently neutral to prevent it from violating the Establishment Clause." *Freiler II*, (Appendix A to Petition, p.2a, emphasis supplied).[4] Confined as it is to its specific facts, this is a narrow ruling that does not warrant review.[5]

Certiorari is not appropriate in cases of isolated violations not likely to recur. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 75 S.Ct. 614 (1955). "Special

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[4] It is obvious from *Freiler I* that the ruling in *Freiler II* was not intended to affirm the constitutionality of evolution disclaimers generally. *Freiler I* specified the pertinent facts, including the history of the failed "Creation Science" curriculum and the discussions at the meeting when the Disclaimer was adopted. (Appendix B to Petition, fn. 1 and pp. 16a-18a). The court in *Freiler II* was obviously referring to the facts it had already found in saying that *this* disclaimer, under *these* facts, fails constitutional muster.

[5] That teaching evolution may be of emotional import to people in Tangipahoa Parish – or, more accurately, to members of the School Board – does not justify intervention by this Court. This Court long ago made it clear that school systems may not tamper with the state-mandated teaching of evolution, e.g. *Epperson v. Arkansas*, 393 U.S. 97, 89 S.Ct. 266 (1968); *Edwards v. Aguillard*, 482 U.S. 578, 107 S.Ct. 2573 (1987). The School Board's dissatisfaction with this Court's clear rulings is not sufficient justification for certiorari.

and important reasons" warranting the grant of certiorari "imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion." *Id.*, 349 U.S. 70, 74. Following *Rice*, and in accordance with this Court's duty to refrain from needlessly deciding constitutional issues, certiorari should be denied in this case, which is confined to a narrow set of facts unlikely to recur.

Under the Opinion subject to review, any future disclaimer statements will have to be examined individually, for their histories, contexts, and specific contents. It is a virtual certainty that the precise facts of this Disclaimer – arising just after the defeat of a "Creation Science" curriculum, adopted specifically because it includes a reference to the Bible and out of an expressed concern for the 90-95% of Christian students who adhere to Biblical precepts – will not recur elsewhere. This is as isolated a violation as any can be, and for that reason it is not appropriate for this Court's review.[6]

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[6] The School Board would like this to be an "exceptional case" simply because it claims to have been acting to reduce the possibility of offense occasioned by the teaching of evolution. (Petition, p. 8). However, a public school system is under no obligation to avoid offending its students or their parents in matters of curriculum. In fact the reverse may be true: it is the duty of a school to challenge its students and to broaden their minds and their horizons, not to spoon-feed only what they already know.

2. The Disclaimer Advances Religion in Violation of Settled Precedent

A. Public Schools Must be Neutral on Religious Matters

This Court noted a long time ago that "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943). Consistent with that ruling, this Court has long held that public schools may not choose sides in religious controversies. Respect for the religious views of all Americans, particularly schoolchildren, requires that public schools remain neutral on religious matters. *Wallace v. Jaffree*, 472 U.S. 38, 105 S.Ct. 2479, 2486 (1985), *Engel v. Vitale*, 370 U.S. 421, 82 S.Ct. 1261 (1962). "It is a cornerstone principle of our Establishment Clause jurisprudence that public schools not seek to influence religious choices of students." *Lee v. Weisman*, 505 U.S. 577, 588 (1992). As a matter of settled law, the religious views of the majority in Tangipahoa Parish may not determine the nature of the school curriculum.

Critical to the application of the *Lemon* endorsement test, *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105 (1971), is an understanding of the facts and context of the Disclaimer.[7] Evolution is the only topic in the Tangipahoa Parish schools subject to such a disclaimer. It is singled

[7] Respondents believe that the Disclaimer violates the "purpose" prong of the *Lemon* test as well as the endorsement prong, and to that extent they believe that the Fifth Circuit erred in *Freiler I*.

out because School Board members have a religious objection to it. This is *per se* endorsement of religion under any possible analysis of *Lemon* or any other decision of this Court.[8] The Fifth Circuit, in both its panel and en banc opinions, correctly applied the law on endorsement. This matter therefore does not warrant review.

B. There is No Conflict in the Circuits on the Issues Raised, and the Decision Below is Fully Consistent with Controlling Law

The law is well settled that schools may not seek to advance a religious alternative to evolution. *Epperson v. Arkansas*, 393 U.S. 97, 89 S.Ct. 266 (1968) (striking down a ban on teaching evolution); *Edwards v. Aguillard*, 482 U.S. 587, 107 S.Ct. 2573 (1987) (invalidating mandatory teaching of "Creation Science"). Over the years there have been many unsuccessful attempts to introduce "Creation Science" into public school curricula, or otherwise to undermine the teaching of science by introducing religious beliefs. Based on long-established precedent of this Court, to date no lower court has permitted such an

[8] The School Board makes much of the panel's initial substitution of the word "and" for "or" in one sentence of the Disclaimer, positing that the Disclaimer does not endorse religion because it encourages students to form their own opinions rather than to adhere to those of their parents. However, because any non-scientific "opinion" about life's origins is by definition religious, the court in *Freiler II* properly acknowledged that this error was a distinction without a difference.

intrusion of religion into the science classroom. E.g. *Peloza v. Capistrano Unified School District*, 37 F.3d 517 (9th Cir. 1994) (upholding a teacher's obligation to teach evolution despite a religious objection); *Helland v. South Bend Community School Corporation*, 93 F.3d 327 (7th Cir. 1996) (upholding termination of substitute teacher who, among other things, taught creationism in a fifth-grade science class); *Webster v. New Lenox School District No. 122, et al.*, 917 F.2d 1004 (7th Cir. 1990) (upholding prohibition against teaching "nonevolutionary theories of creation"). The unanimity with which appellate circuits have struck down all attempts to introduce religious "alternatives" to evolution is further indication that the law in this area is settled, that there is no conflict among the circuits, and that this case does not warrant certiorari.

CONCLUSION

For all of the above reasons, Respondents submit that the Petition for Certiorari should be denied.

Respectfully submitted,

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